



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 20, 1995

Ms. Christine T. Rodriguez
Staff Attorney
Legal and Compliance, 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR95-1096

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 29231.

The Texas Department of Insurance (the "department") received a request for the following information:

1. The list of all vehicle VIN numbers and license plates insured by the FIIE [Food Industry Insurance Exchange] for West End Cab Company by month since the policy issue date on April 15, 1994, to current. This would be the list which premiums were paid against.
2. Copies of premium billings for the period April 15, 1994, to current.

The release of the requested information implicates the rights of two third parties, the West End Cab Company (the "cab company") and Food Industry Insurance Exchange (the "insurance company"). When a third party's rights are implicated by the release of requested information, section 552.305 of the Government Code permits a governmental body to rely on the third party to raise and explain the applicability of exceptions in the Open Records Act. Gov't Code § 552.305; *see* Open Records Decision No. 542 (1990).

The department raises no exceptions to the release of the requested information. The cab company asserts that the requested information is excepted from required public disclosure under sections 552.104, 552.110, and 552.112 of the Government Code. The insurance company asserts that the requested information consists of confidential proprietary business records.

Section 552.104 states that:

Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

The purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Consequently, a governmental body may waive section 552.104. *See* Open Records Decision No. 592 (1991) at 8.

In this instance, the department does not raise section 552.104; only the cab company does so. Section 552.104 is inapplicable to protect the interests of the cab company. Accordingly, the department may not withhold the requested information based on section 552.104 of the Government Code.

Section 552.110 excepts from required public disclosure two branches of information: "trade secrets," and "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." The cab company asserts that the requested information is excepted from required public disclosure under section 552.110 as a trade secret. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . .

[but] a process or device for continuous use in the operation of the business . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). The Restatement also lists the following six factors to be considered in determining whether particular information constitutes a trade secret:

- 1) the extent to which the information is known outside of [the company's] business;
- 2) the extent to which it is known by employees and others involved in [the company's] business;
- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information;
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id.

This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6. We do not believe the cab company has established a prima facie case for trade secret protection.

The insurance company asserts that the information at issue is a proprietary business record that "would be useful to a competitor since it would divulge the pricing schedule used by the company as well as information regarding our insureds." These assertions do not establish that the information is a trade secret. Nor do they establish

that the information fits into the branch of section 552.110 that applies to "commercial or financial information obtained from a person and confidential by statute or judicial law." See Open Records Decision No. 592 (1990). Accordingly, the department may not withhold the requested information based on section 552.110.

Section 552.112(a) excepts from required public disclosure

information contained in or related to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both.

Insurance companies are included within the term "financial institutions" for purposes of section 552.112(a). Open Records Decision No. 158 (1977) at 5-6. However, this provision only applies to information contained in or related to specific examination, operating, or condition reports. See Open Records Decision No. 483 (1987) at 9. Although you inform us that the department obtained the information pursuant to article 1.32 of the Insurance Code, it is not apparent to us that the requested information is "contained in or related to a specific examination, operating, or condition report." Accordingly, the department may not withhold the requested information based on section 552.112 of the Government Code.

In conclusion, the department may not withhold the requested information based on sections 552.104, 552.110, or 552.112 of the Government Code. Therefore, the department must release the requested information.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kay Guajardo", written in a cursive style.

Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/rho

Ref.: ID# 29231

Enclosures: Submitted documents

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